

MEMORANDUM OF LAW

DATE: December 13, 1985

TO: Steve West, Economic Development Director

FROM: City Attorney

SUBJECT: Membership of Council Staff on Board of  
Directors of Neighborhood Improvement Council  
Inc.

In a memorandum dated November 29, 1985 you asked this office if the recent appointment of Mr. Richard Juarez to the Board of Directors of the San Diego Neighborhood Improvement Council Inc. (NIC) was appropriate. Your Department administers a contract with NIC utilizing Community Development Block Grant funds from the U.S. Department of Housing and Urban Development. NIC is a California nonprofit corporation which provides community organizational services primarily within the Project First Class area. As a member of the Board, Mr. Juarez exercises some general supervision over the operations of the NIC but he is not

an employee, he is not engaged in day to day management of the agency and he is not financially compensated for his services to NIC.

Mr. Juarez is a public official who is subject to the provisions of the Political Reform Act. (Government Code sections 81000 et seq.) The Political Reform Act limits public officers' decisions which may have a material financial effect upon them. (Government Code section 87100). Section 87103 defines when a decision may have a material effect:

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollar (\$1,000) or

more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or hold any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

For purposes of this section, indirect investment or interest means any investment or

interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

Since Mr. Juarez' receives no income and a nonprofit corporation is not a business entity (Government Code section 82005), his appointment to the NIC Board does not create a conflict of interest.

There is also the common law doctrine of incompatible offices which must be analyzed. Public policy demands that an officeholder discharge his duties with undivided loyalty. The doctrine of incompatibility is intended to assure performance of that quality. McQuillan's Municipal Corporations section 12.67. Long ago the California Supreme Court defined this doctrine as follows:

At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the

functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. (Emphasis added)

People Ex Rel. Chapman v. Rapsey, 16 C.2d 636, 641-642 (1940).

While the Department Mr. Juarez works for supervises the performance of the contractor, in the Chapman case and in subsequent cases, this rule has only been applied when both of the offices are public offices. Chapman, supra at 639. We have researched and have found no case where the doctrine has been applied to officers of nonprofit corporations.

There is one more area to be addressed. This agreement is

funded with CDBG funds. The expenditure of federal funds is governed by many rules, one of which is Office of Management and Budget Circular A-102 which provides in pertinent part:

(b) All procurement transactions regardless of whether negotiated or advertised and without regard to dollar value shall be conducted in a manner so as to provide maximum open and free competition. The grantee should be alert to organizational conflicts of interest or noncompetitive practices among contractors which may restrict or eliminate competition or otherwise restrain trade.

The presence of a key staff person from the office of the Councilman whose district is the primary focus of the program run by the contracting agency could be determined to be an organizational conflict of interest. We suggest that your Department have this question reviewed by HUD before the contract is scheduled for renewal.

JOHN W. WITT, City Attorney

By

John K. Riess

Deputy City Attorney

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